

National Treasury Employees Union



**Testimony
Of
Colleen M. Kelley
National President
National Treasury Employees Union**

“NTEU Views on Flawed A-76 Revisions”

June 26, 2003

**Committee on Government Reform
2154 Rayburn House Office Building**

Chairman Davis, Ranking Member Waxman, and other distinguished Members of this committee, my name is Colleen Kelley and I am the National President of the National Treasury Employees Union (NTEU). I was one of the twelve members of the Commercial Activities Panel (CAP). NTEU represents 150,000 federal employees in 29 federal agencies and departments. I appreciate you giving me the opportunity to share the views of frontline federal employees on the Office of Management and Budget (OMB) rewrite of the A-76 outsourcing rules, and how the new A-76 will affect the Administration's privatization initiatives.

Let me be very clear: NTEU strongly opposes OMB's quota-driven campaign to privatize more than 850,000 federal employee jobs. OMB's rewrite of A-76 gives agencies even greater flexibility to turn the work of the federal government over to private contractors. I caution committee members not to be misled by OMB rhetoric that this new A-76 Circular will improve the use of public-private competitions. Instead, the new A-76 Circular is designed to give OMB one more tool to contract out as many federal employee jobs as quickly as possible. While the old A-76 Circular was not perfect, the revisions are unfair to federal employees, and will result in contractor services at higher costs and lower value to the taxpayers.

Opening Up Inherently Governmental Jobs to Contractors

Under the A-76 revisions, more federal jobs will be put up for grabs to the private sector, since OMB's sweeping changes expand the number of federal employee jobs eligible for privatization. Last week, NTEU filed a lawsuit in federal court alleging that OMB's revisions to A-76 are illegal. NTEU believes that OMB has illegally trumped Congress on the sensitive issue of determining whether a function is "so intimately related to the public interest as to require performance by federal government employees." In the lawsuit, we point out that the A-76 revisions require federal agencies to apply a substantially narrower definition of inherently governmental functions than is now contained in federal law. Under the Federal Activities Inventory Reform (FAIR) Act of 1998, activities that are inherently governmental may only be performed by federal employees, while those activities designated as "commercial" may be contracted to the private sector.

The FAIR Act requires the exercise of "discretion" for a function to be deemed inherently governmental. The revised Circular A-76, on the other hand, rules out as inherently governmental all functions that do not require the exercise of "substantial" discretion – a significant difference in language.

Moreover, functions involving the collection, control or disbursement of federal funds, which have been deemed inherently governmental under the FAIR Act and well before the FAIR Act, may obtain that designation under the new circular only if they include the authority "to establish policies and procedures."

These sweeping changes would have a substantial adverse impact on large numbers of federal employees, including thousands of NTEU-represented employees who are engaged in the collection, control or disbursement of appropriated or other federal funds, even though they may not be responsible for "establishing policies or procedures." For example, as a result of OMB's unilateral expansion of the definition of "commercial in nature," we have already heard from the

IRS that their FAIR Act inventory of federal jobs eligible for privatization will nearly double next year.

In conjunction with narrowing the inherently governmental definition, OMB also has restricted the rights of unions and other interested parties to challenge improper agency designations of functions as “commercial.” The circular replaces the FAIR Act’s broad right to pursue such “challenges” with a one-shot opportunity to file a challenge only if and when an agency changes the function’s classification. This, too, runs afoul of the FAIR Act.

Ensuring that inherently governmental functions are performed by federal employees only is firmly rooted in sound government policies, such as ensuring that confidential taxpayer information is safeguarded and that the government maintains needed expertise at all times. I urge this committee to seek to uphold the long held definition of inherently governmental.

NTEU has several other concerns with the A-76 revisions. In response to OMB’s initial proposed revisions to Circular A-76, NTEU submitted detailed comments describing how the new provisions were unfair to federal employees and would deprive taxpayers of the benefits of true public-private competition. Unfortunately, the final version of the Circular remains heavily slanted in favor of private contractors over federal employees, and will deprive taxpayers of the benefits of fair competition.

Lack of Accountability from Contractors

The revisions to A-76 will move even more federal jobs to the private sector, yet the revisions would not make one single meaningful change to improve oversight of contractors and better track their performance. Oversight is particularly important now, as the Administration requires that more and more government functions be opened to contractors. The revised Circular continues to fail in effectively holding contractors accountable for their costs and performance. The Circular endorses the status quo of asking agencies to monitor the work of contractors, without having given these agencies any additional resources to better track their work.

The revised Circular requires agencies to redouble their time and resources to produce inventories of the size and makeup of the entire federal workforce, including those performing both commercial and inherently governmental functions, yet it fails to require agencies to implement systems to track whether current contracting efforts are in the best interests of the taxpayers. The new A-76 continues to disregard the need for agencies to determine how much the contractors’ work costs the taxpayers, how the actual costs of the contract compare to what the contractors originally promised, whether the contractors are delivering the services they promised to deliver within the timeframes they promised, and whether the services are being delivered at an acceptable level of quality. When a contractor is not living up to its end of the deal, the government must have the realistic capability to bring the work back in-house. The government owes this accountability to the taxpayers who fund it. Agencies and the taxpayers did not know this information before the revised A-76 was released, and they would still be in the dark now.

Once a contractor gets a contract, that work is out the door and rarely--if ever--scrutinized again. For example, Mellon Bank, a contractor hired by the IRS as part of its "lockbox program," lost, shredded, or removed 70,000 taxpayer checks worth \$1.2 billion in revenues for the U.S. Treasury. In January of this year, GAO issued a report (GAO-03-299) criticizing the inadequate oversight of Mellon Bank. Among other things, GAO found that:

- (1) "Oversight of lockbox banks was not fully effective for fiscal year 2002 to ensure that taxpayer data and receipts were adequately safeguarded and properly processed. The weaknesses in oversight resulted largely from key oversight functions not being performed" (p.3)
- (2) "Tax receipts and data were unnecessarily exposed to an increased risk of theft." (p. 21)
- (3) Contract "employees were given access to taxpayer data and receipts before bank management received results of their FBI fingerprint checks." (p.29)

Another example of poor agency management of contractors came to light recently when a contractor hired by the IRS and other federal agencies to provide bomb detection dogs and services to patrol the perimeters at several federal facilities, including the IRS Service Center in Fresno, was convicted after he lied about the qualifications of his dogs, then faked the dogs' certifications to keep his business with these federal agencies. Fortunately, the government was able to catch this contractor, but unfortunately it was well after the contractor already had put at risk the security of thousands of federal employees.

The new A-76 fails to make any genuine improvements in contractor oversight to prevent Mellon Bank or security dog contracting frauds from happening again. I wish I could say with a straight face that lessons have been learned from contracting debacles of the past and OMB has applied these lessons to the new A-76. Unfortunately, I cannot. The new A-76 is business as usual when it comes to lack of accountability from contractors. Taxpayers and federal employees deserve, at a minimum, the same level of transparency and accountability from contractors as there is of the federal workforce.

Privatization Without Competition

While I was very concerned that a number of the issues NTEU raised were not addressed in the revised A-76 Circular, I was pleased that the new Circular supposedly eliminates the use of direct conversions, a flawed privatization process in which federal employees are not given an opportunity to compete in defense of their jobs. The revised Circular mandates that even those direct conversions underway under the old Circular, but not publicly announced before May 29, 2003, must be converted to streamlined or standard competitions within 30 days.

However, within days of the release of the revised Circular, we started hearing complaints about the new direct conversion rules from agencies that were performing such conversions prior to May 29 under the old Circular. And now, it is unclear what action, if any, OMB will take with agencies that are either bypassing the new rules altogether or seeking waivers to continue with direct conversions. Like so much in the A-76 Circular, OMB has

managed to create numerous loopholes to ensure that more government jobs are moved to the private sector as quickly as possible and with as little competition as possible.

Another loophole for agencies to circumvent OMB's stated goals for competition is the so-called "streamlined competition" process. Streamlined studies are nothing more than sugar-coated direct conversions, in which federal jobs are transferred to contractors without first giving federal employees an opportunity to put forward a competitive proposal. Much like the direct conversion provisions in the old A-76, the new streamlined rules emphasize speed in privatizing federal jobs at the expense of quality and costs.

Agencies can use the streamlined process if a government function involves fewer than 65 federal employees. Because of the rigid timeframe of 90 days in which agencies must complete the streamlined study, agencies have absolutely no incentive to reorganize their own employees in a way that will deliver higher quality services to the taxpayers at a lower cost. The shortened process will make it harder, if not impossible, for an in-house proposal to maximize new efficiencies and innovations, thereby creating a strong bias in favor of the outside contractor. This streamlined proposal runs counter to the recommendation of the Commercial Activities Panel to encourage the establishment of high-performing organizations and continuous improvements throughout the federal government.

Furthermore, under a streamlined study, no longer are contractors required to come in at the lowest cost with their bids in order to win the competition: contracts can now be awarded to contractors if their bids are "cost effective," a much weaker selection criteria to meet. And whereas in the past, the costs incurred by the taxpayers as a result of converting federal work to contractors were factored into the private sector bids, these costs are no longer included under a streamlined study. Finally, what limited rights employees have to challenge faulty award decisions under standard A-76 competitions have been completely eliminated under the streamlined process.

Privatization of Tax Collection Activities

It is no coincidence that at the same time OMB was revising A-76 and enforcing its privatization quotas, the IRS was developing a proposal with private debt collectors to privatize tax collection functions. This is even further evidence of the Administration's aggressive push to privatize government activities with or without competition and whether or not they are inherently governmental.

Tax collection has always been off limits to private contractors, since it has historically been deemed an inherently governmental function. Even under the new A-76's watered down definition of inherently governmental, the Administration acknowledges that tax collection is inherently governmental, and would require legislation before it could be privatized. But the fact that the Administration is even seeking legislative authority to outsource tax collection proves that if for some reason A-76 does not allow an agency to privatize a certain function, this Administration will find a way to privatize it.

Under this latest scheme, the IRS is proposing to pay private collection agencies on a commission basis to collect tax debt. The IRS wants to privatize these activities without first conducting a public-private competition to determine what is best for the taxpayers.

The IRS tax collection privatization proposal will cost the taxpayers \$3.25 billion, more than ten times as much as it would cost the IRS to use its own employees. In a report submitted to the IRS Oversight Board last September, titled “Assessment of the IRS and the Tax System,” former Commissioner Charles Rossotti made clear that with more resources to increase IRS staffing, the IRS will be able to close the compliance gap. The report found that if Congress were to appropriate an additional \$296 million to hire more IRS compliance employees to focus on Field and Phone Accounts Receivable, the IRS could collect an additional \$9.47 billion in known tax debts per year. This would be a \$31 return for every dollar spent. Compare that to the contractor 25% commission scheme in which the contractors will be paid \$3.25 billion to collect \$13 billion: a three dollar return for every dollar spent. According to the Joint Committee on Taxation, the Administration’s tax collection privatization proposal would bring in less than \$1 billion over ten years at a cost of over \$200 million. The IRS could bring in that amount in one year with just over \$30 million in additional in-house enforcement resources.

The proposal to privatize tax collection is opposed by the Citizens for Tax Justice, the Consumer Federation of America, the Consumers Union, the National Consumer Law Center, and the National Consumers League. And concerns about the IRS’s ability to manage debt collection contractors and adequately protect the rights and privacy of the American taxpayers have been raised by the General Accounting Office, the Treasury Inspector General for Tax Administration, the National Taxpayer Advocate, the Tax Executives Institute, the National Association of Enrolled Agents, and the Tax Section of the American Bar Association.

Two pilot projects were authorized by Congress to test private collection of tax debt for 1996 and 1997. The 1996 pilot was so unsuccessful that the 1997 project was cancelled. Contractors violated the Fair Debt Collection Practices Act (FDCPA) and did not protect the security of sensitive taxpayer information and the IRS officials charged with oversight of the contracts were ill-informed of the law and lax in their duties, failing to cancel the contracts of those in violation even though they had the authority to do so.

In addition to using prohibited collection techniques and not safeguarding confidential taxpayer information, the contractors did not bring in anywhere near the dollars they projected, millions of dollars were spent by the IRS to train the contractors, and millions were not collected by IRS employees because they were training the contractors instead of doing their jobs. (See GAO/GGD-97-129R and IRS Private Debt Collection Pilot Project, Final Report, Oct. 1997)

So while we are here today debating the nuances of OMB’s troubling revisions to the A-76 Circular, in practice, agencies are seeking to privatize thousands of federal employee jobs without using A-76. Billions of taxpayer dollars are flying out of the Treasury coffers to pay private contractors to perform government functions that were never – and if OMB has its way, will never be – first subjected to public-private competition. Based on what NTEU sees happening at federal agencies, it is obvious that OMB’s real motive behind the A-76 revisions is

to move more federal jobs to the private sector, regardless of cost, quality, and reliability of services.

Congress should require OMB to go back to the drawing board and develop an A-76 process that requires public-private competition before any government work is privatized, instead of one that allows agencies to pick and choose when they want to use a competitive process.

A Process That Costs the Taxpayers

After seeing all of the loopholes in A-76 to privatize federal jobs without competition, it is hard to believe that the A-76 process is actually supposed to be about competition. But even if agencies actually do conduct a standard A-76 public-private competition, OMB's changes tilt the playing field heavily in favor of contractors. First of all, agencies are required to complete standard A-76 competitions within twelve months, even though the most efficiently run A-76 studies have routinely taken 18 months or more to complete. And while OMB has gone to great pains to include every potential cost of federal employee performance of the work, the new A-76 arbitrarily excludes from the private sector bid legitimate costs of doing business with non-governmental entities. As an example of a windfall to the contractors in the costing process, the cost that must be incurred for a performance bond, if required by the solicitation, would be excluded from the contractor's price when compared against the agency bid. This is an actual cost of doing business with contractors that would not be incurred if federal employees performed the service: yet once again the contractors enjoy the benefit of having this cost excluded.

A Costly Alternative

NTEU is also concerned that the new A-76 Circular encourages agencies to move away from cost-based competitions to more subjective analyses that will lead to more outsourcing at higher costs to the taxpayers. The revised Circular now allows agencies to use the so-called "Tradeoff Source Selection Process" for selecting a winner in a competition between federal employees and contractors. This proposal is harmful not just to federal workers, but to American taxpayers who will wind up paying more than is necessary to get the job done and who will have less accountability as to how their tax dollars are spent.

The revisions to the Circular would, for the first time, allow contracting officers to use subjective determinations in public-private competitions. This would allow contracting officers to award contracts to a bidder that comes in with a more expensive bid than other bidders, but promises to perform work not requested by the agency. Introducing this tradeoff concept into public-private competitions would make fair comparisons between bids even more difficult, as it undermines the agency's ability to conduct an "apples-to-apples" comparison, an important aspect of any procurement decision.

OMB claims that the tradeoff process would be implemented on a limited basis only. However, the revised Circular gives agencies wide latitude to use this process. If the Administration is adamant about using this risky process, then it should first limit its application, so that we can find out whether or not it works for the taxpayers. Not until this process has been

tested and proven effective should the study be approved for government-wide use by the agencies.

I welcomed the Administration's effort to revise the OMB Circular A-76 as an excellent opportunity to improve the delivery of services to the taxpayers through fair competition on a truly level playing field for those competing. To my dismay, the new A-76 does nothing to advance the principles of increasing taxpayer value and leveling the playing field. Not only would federal employees suffer as a result of the revisions, but the taxpayers would as well. I therefore urge this committee to work to block the implementation of the revised A-76 until the countless problems I mentioned are resolved.

Thank you for giving me the opportunity to testify today.